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No. 88-1374

In the Supreme Court of the United States

October Term, 1988

The Jimmy Swaggart Ministries,
Appellant,
v.
Board of Equalization of California,
Appellee

On Appeal from the Court of Appeal, State of California Fourth Appellate District, Division One

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BRIEF AMICUS CURIAE OF THE NATIONAL TAXPAYERS UNION IN SUPPORT OF APPELLANT

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QUESTIONS PRESENTED

I. Does a state violate the establishment clause when it passively refrains from collecting revenue because of a constitutional immunity from sales and use tax on the distribution of religious literature by a church to its own members?

II. Does a state have sufficient nexus to impose sales and use tax liability on an out-of-state religious organization for its distribution of religious literature to its religious adherents either by virtue of the conducting of occasional religious rallies within the taxing state, or by virtue of the use of the mails by the out-of-state religious body to distribute religious literature to its religious adherents within the taxing state?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. The Establishment Clause is not Violated When the Government Passively Refrains from Collecting Revenue from a Religious Body for the Distribution of Religious Literature 5

A. The Immunity of a Religious Body from Taxation on the Distribution of Religious Literature to its own Adherents does not Constitute an Impermissible Direct Governmental "Subsidy" to Religion 7

B. The History of Repugnance to Taxes on Knowledge Informs the Current Discussion over Whether A State May Impose Sales Tax on a Religious Body for the Distribution of Religious Literature to its Members Attending a Rally within the Taxing State 17

II. Neither Occasional Visits within a Taxing State, Nor the Use of the Mails to distribute Materials Creates Sufficient Nexus to Impose Sales and Use Tax Liability on an Out-of-State Organization 19

III. A Case Focused Primarily on First Amendment Religious Freedoms is Not an Apt Vehicle to Announce a Shift in the Nexus Requirements Governing the Taxation of Commercial Enterprises that Operate in Interstate Commerce 21

TABLE OF AUTHORITIES

CASES CITED:

Page(s)

Baker v. Carr, 369 U.S. 186, (1962) 23

Bob Jones University v. United States,
461 U.S. 574 (1983) 6,13,14

Bowen v. Kendrick,
108 S. Ct. 2562 (1988) 7

Committee for Public Education and Religious Liberty v. Regan,
444 U.S. 646 (1980) 7

Corp. of Presiding Bishop v. Amos,
487 U.S. 237 (1987) 8-9

D.H. Holmes Co. v. McNamara,
108 S. Ct. 1619 (1988) 20,23

Engel v. Vitale, 370 U.S. 421 (1962) 7

Everson v. Bd. of Educ.,
330 U.S. 1 (1947) 7

Ferguson v. Skrupa,
372 U.S. 726 (1963) 14

Follett v. McCormick,
321 U.S. 573 (1944) 4,9,10,17

Goldberg v. Sweet,
109 S. Ct. 582 (1989) 23

Page(s)

Grand Rapids Sch. Dist. v. Ball,
473 U.S. 373 (1985) 7

Grosjean v. American Press Co.,
297 U.S. 233 (1936) 17

Jones v. Opelika I,
316 U.S. 584 (1942) 9

Jones v. Opelika II,
319 U.S. 103 (1943) 9

Larson v. Valente,
456 U.S. 228 (1982) 16

Miller Bros. Co. v. Maryland,
347 U.S. 340 (1954) 4,19

Murdock v. Pennsylvania,
319 U.S. 105 (1943) 4,9,10,17

National Bellas Hess v. Dept. of Revenue,
386 U.S. 753 (1967) 4,5,19

National Geographic Society v. California Bd. of Equalization,
430 U.S. 551 (1977) 4,19

Regan v. Taxation With Representation,
461 U.S. 540 (1983) 13

Texas Monthly, Inc. v. Bullock,
109 S. Ct. 890 (1989) 2,5,6,16

Tyler Pipe Industries, Inc. v. Washington Dept. of Rev.,
107 S. Ct. 2810 (1987) 20

Page(s)

United States v. Seeger,
380 U.S. 163 (1965) 2

Walz v. Tax Comm'n of City of New York,
397 U.S. 664 (1970) 8,10-13,15

Welsh v. United States,
398 U.S. 333 (1970) 2

STATUTES:

Calif. Rev. & Tax. Code, §§ 6451-6452,
6455 20

Tex. Tax Code, §151.312 5

OTHER AUTHORITIES:

C. Antieau, A. Downey, and E. Roberts,
Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses
(1964) 8

Bittker, *Churches, Taxes and the Constitution*,
78 Yale L. J. 1285 (1969) 14

Bittker, *Charitable Contributions: Tax Deductions or Matching Grants?*
28 Tax L. Rev. 37 (1972) 13

Bittker and Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 Yale L. J. 299
(1976) 14

M. Carter, *The Tax Expenditure Budget: A Critical Examination* (1983) 12

Page(s)

T. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (1986) 8

Giannella, *Religious Liberty, Nonestablishment and Doctinal Devlopment, Part I.* 81 Harv. L. Rev. 513 (1968) 12

W. McLoughlin, *New England Dissent: 1630-1833: The Baptists and the Separation of Church and State* (1971) 8,17

E. & H. Morgan, *The Stamp Act Crisis* (1963) 17

K. Ripple, *Constitutional Litigation* (1984) 23

S. Surrey, *Pathways to Tax Reform* (1973) 14

S. Surrey & P. McDaniel, *Tax Expenditures* (1985) 14

Touche-Ross, *A Study to Determine the Economic Impact on Mail-Order Firms of Multi-State Sales Tax Collection* (1986) 15,16

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BRIEF AMICUS CURIAE OF THE NATIONAL TAXPAYERS UNION IN SUPPORT OF APPELLANT

INTEREST OF THE AMICUS

The National Taxpayers Union (NTU) was founded in 1969 as a citizens' lobby on tax matters. NTU is a non-profit membership organization devoted to protecting the interests of federal, state and local taxpayers through public education, lobbying and litigation on tax and spending issues. With members in all 50 states, NTU represents 200,000 members.

The sales and use tax laws of the thousands of taxing jurisdictions that rely on this means of revenue production are a patchwork quilt that was formed in a process responsive to the tug and pull, the rough and tumble of American politics.[1] Under these circumstances, it is quite plausible that economic burdens might fall - now here and now there - without perfect symmetry. The

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1 As the Tables in the Appendix to Appellant's Brief reflect, it might be more accurate to describe these laws as a jumble or a maze. See Appellant's Br., A-1 et seq.

redress, if any, for these uneven outcomes, will normally have to be through the same political process that created the perceived flaws in the structure. For that very reason, amicus regularly engages in testimony to Congress and other legislative bodies about issues affecting the interests of taxpayers.

But in our constitutional order there are some things that simply lie beyond the power of the government to tax at all. In the view of the amicus, the distribution of religious literature by a church[2] to its members is one of them. To delineate appropriate limits on the taxing power, amicus also engages in selected litigation.

The limit that the First Amendment Religion Clause places on governmental authority to impose burdensome sales and use tax liability on religious bodies for the distribution of religious literature to their religious adherents was severely eroded by the decision below. NTU recognizes that religious freedom is one of the precious few limits on the government's power to take property away for its own ends. The mere fact that such restraints in our system are few does not mean that they are not precious.

NTU has had extensive experience in tracking the exponential growth of the sales and use tax as a major source of revenue for state and local governments, especially after the recent taxpayers' revolts that reduced and restricted the property tax in several states, including California and Massachusetts. NTU has, moreover, participated in extensive study of the efforts of state and local governments to erode the restraints on their taxing authority defined by this Court in its interpretation of the Commerce Clause and the Due Process Clause. NTU has testified before the appropriate committees of Con-

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2 The term "church" in this brief refers not only to traditional religious groups, but also to "nonreligious organizations devoted to such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong." *Texas Monthly, Inc. v. Bullock* 109 S. Ct. 890, 906 (1989) (Blackmun, J., concurring); see also *Welsh v. United States*, 398 U.S. 333 (1970); and *United States v. Seeger*, 380 U.S. 163 (1965).

gress about the constitutional dangers and policy folly of eroding those restraints through ill-considered legislation that would unleash the taxing authority of the states and local governments without a showing of adequate nexus between a taxpayer and a taxing entity. NTU is thus in a unique position to advise this Court about the tax policy implications of imposing sales and use tax liability on an out-of-state religious body for distribution of religious literature to its members within the taxing state.

NTU submits this brief as amicus curiae in support of appellant. The parties have consented in writing to the filing of this brief, and copies of the consent letters have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

This case provides an excellent opportunity for reassessing the view that tax exemptions are always the functional equivalent of a governmental subsidy. Although frequently viewed as a "subsidy," a pure tax exemption is not the same as a direct governmental outlay. In the First Amendment context, above all, it is imperative to refrain from painting with a brush too broad. The failure to differentiate exemptions from subsidies leads to unnecessary conceptual difficulties and to results, illustrated by the decision below, that are at odds with important constitutional limits on governmental power.

The California Court of Appeal ruled in this case (a) that the State of California may impose sales tax for the distribution of religious literature to religious adherents attending occasional religious rallies in California, and (b) that the State of California may impose use tax liability on an out-of-state religious body when it uses the mails to distribute religious literature to religious adherents in California. Neither conclusion is correct.

The First Amendment Religion Clause precludes the direct imposition of sales tax liability on the transmission of a religious message by a preacher to his religious adherents. Acknowledging the immunity of religious bodies from this form of taxation on the distribution of religious

literature does not offend the prohibition against an establishment of religion because a merely passive restraint on the collection of revenue by the government does not constitute an impermissible direct governmental subsidy to religion.

This conclusion is sound for two reasons. First, a limited immunity of religious bodies for the distribution of religious literature is required to respect the separation of church and state. Second, the history of repugnance to taxes on knowledge informs the current discussion over whether a state may impose sales tax on a religious body for the distribution of religious literature to its members.

In the light of these considerations, it makes little sense to say that the Constitution requires a particular form of tax immunity, and then to characterize that immunity as though the government were "subsidizing" the person who enjoys the immunity. That is to misunderstand the nature both of an immunity and of a subsidy. On this basis, amicus urges this Court to adhere to its precedents establishing immunity from taxation for religious preachers distributing religious literature. See *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Follett v. McCormick*, 321 U.S. 573 (1944).

Amicus also urges this Court to adhere to its precedents requiring continuous presence, not mere occasional contacts of an out-of-state party, in order to establish sufficient nexus with a taxing jurisdiction for purposes of use tax liability. See *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551 (1977); *National Bellas Hess v. Dept. of Revenue*, 386 U.S. 753 (1967); *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954). Under these cases, it is clear that the Commerce Clause and the Due Process Clause preclude a state from exercising jurisdiction over a person outside its borders unless there is sufficient nexus.

The Board of Equalization predicated its claim to jurisdiction on the occasional presence of a preacher in the state to conduct a religious meeting. It is impermissible to base the jurisdiction of the state to tax on

an event manifestly involving protected noncommercial, religious speech. Even if it were permissible to establish nexus on the basis of the clearly protected activity of preaching, the infrequent visits of the appellant to California are insufficient under the precedents of this Court on nexus. Neither may nexus with California be predicated on the mere use of the federal instrumentality of the mails by a preacher in Louisiana to distribute religious literature to religious adherents in California.

In the view of amicus, the teaching of this Court in *Bellas Hess* on nexus is a bedrock foundation for a proper view of the limits of the taxing authority of state and local governments. Even if a majority of this Court were inclined to modify *Bellas Hess* in some way, this case is not the occasion to do so. In its present posture before this Court, this case is focused primarily on important First Amendment freedoms. For this reason, amicus urges this Court to avoid dictum in the resolution of this case that might cast doubt on the nexus requirements governing the taxation of commercial enterprises that operate in interstate commerce.

ARGUMENT

I. The Establishment Clause is not Violated When the Government Passively Refrains from Collecting Revenue from a Religious Body for the Distribution of Religious Literature.

In *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890 (1989), this Court recently invalidated a statute that exempted from sales tax "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith." Tex. Tax Code §151.312 (1982). A plurality of three Justices was of the view that, "when confined exclusively to publications advancing the tenets of a religious faith, the exemption runs afoul of the Establishment Clause." *Id.* at 894. One of the reasons suggested in support of

this view was that every "tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become 'indirect and vicarious "donors."'" *Id.* at 899, citing *Bob Jones University v. United States*, 461 U.S. 574, 591 (1983). For the reasons offered below, amicus is of the view that this conclusion sweeps too broadly.

Appellant has suggested plausible grounds on which to distinguish this case both from *Texas Monthly* and *Bob Jones*. See Appellant's Brief, Part I. Amicus does not repeat those distinctions here, but simply makes three observations about *Texas Monthly* and this case. First, the plurality's conclusion that the Texas statute could not "reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion," 109 S. Ct. at 899, was reached in a case where the defense of the constitutionality of the sales tax exemption on Establishment Clause grounds was left to the State Attorney General, without the participation of any religious body in any capacity to inform the Court about the potential impact of imposing sales and use tax liability on these kind of organizations.[3] Second, amicus notes that this Court now has a case before it that might serve as a vehicle to address the question that some of the Justices in *Texas Monthly* deemed open, "the extent to which the Free Exercise Clause requires a tax exemption for the sale of religious literature by a religious organization." 109 S. Ct. 907 (Blackmun, J., concurring). Third, the approach that amicus urges to this very question is that it is better to think of the issue in this case as whether a *preacher has a constitutionally grounded immunity from taxation on the direct communication of a religious message to his religious adherents*.

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3 The Amicus Brief of Evangelical Council for Financial Responsibility, et al., filed in support of appellant in this case, demonstrates that, contrary to the view expressed by the plurality in *Texas Monthly*, the imposition of sales and use tax liability on religious ministries engaged in the distribution of religious literature would gravely "inhibit religious activity." 109 S. Ct. at 901.

In light of these considerations, amicus urges this Court to distinguish carefully in this case between *direct cash subsidies* from the federal or state treasuries to support any particular religious view and purely *passive restraints on governmental taxing power*. Amicus agrees that most direct cash subsidies to a religious group to carry on its religious activities are prohibited under the Establishment Clause. But where, as here, the Constitution confers an immunity from taxation, mere passive restraints on the Taxing Power that are themselves constitutionally grounded should not be deemed to be impermissible governmental subsidies.

A. The Immunity of a Religious Body from Taxation on the Distribution of Religious Literature to its own Adherents does not Constitute an Impermissible Direct Governmental "Subsidy" to Religion.

As Justice White acknowledged in *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646 (1980), "Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country." *Id.* at 662. Notwithstanding the controversy over the Religion Clause both within this Court and among the people of this country, there is a strong consensus that the nonestablishment principle forbids the placing of the "financial support of government" behind a particular religious belief. *Engel v. Vitale*, 370 U.S. 421, 431 (1962). On this view, a direct cash grant from the public treasury to a religious body to support its religious activity under the purported authority of the Spending Power would be a clear instance of the kind of direct governmental subsidies that have been prohibited under the Establishment Clause.[4]

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4 See, e.g., *Bowen v. Kendrick*, 108 S. Ct. 2562, 2580-81 (1988); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 385 (1985); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947), and at 51 (Rutledge, J. dissenting) (objecting to governmental *appropriation* in support of religious edu-

The term "establishment of religion" meant many different things in the eighteenth century. But one of the salient characteristics common to various manifestations of an establishment was coerced collection of revenue from taxpayers by the government and the intentional redirection of that revenue to provide financial support to the religious activities of churches of which the taxpayers were not members. The practice of providing tax support for a preferred or "established" religious group was perhaps the most obnoxious feature of an "establishment of religion" against which the First Amendment took aim.[5]

The real point of this central teaching in Establishment Clause jurisprudence is that transfers of wealth to a religious body for its religious activities must in our constitutional order be made on a voluntary basis, not at the command of the government. That does not, however, mean that if the government refrains from taxing the religious body to which a private party makes a contribution, the *private party's* donation is thereby transformed into an *official governmental act.* That would be to miss the point of the state action requirement. For example, under Title VII of the Civil Rights Act of 1964, as amended, it would be clearly impermissible for the *government* to engage in employment discrimination on the basis of religion. But in *Corporation of Presiding Bishop v. Amos*, 107 S. Ct. 2862 (1987), this Court ruled unanimously that it is equally clearly permissible to allow *religious organizations* to take into account the religious commitments, if any, of

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cation).

5 See, e.g., James Madison, "Memorial and Remonstrance," cited in *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 719-727 (1970) (Appendix II to opinion of Douglas, J., dissenting); T. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (1986); W. McLoughlin, *New England Dissent: 1630-1833: The Baptists and the Separation of Church and State* (2 vols. 1971); and C. Antieau, A. Downey, and E. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* 20-24 (1964).

their own employees.[6] Thus "a law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose." *Id.* at 2868-2869.

The characterization of an immunity from taxation as an impermissible "subsidy" by the *Texas Monthly* plurality was not novel. But when that view was first put forward by the dissenting Justices in *Follett v. McCormick*, 321 U.S. 573 (1944), this Court expressly repudiated it. *Follett* was preceded by *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), in which this Court invalidated the imposition of a flat fee license provision on itinerant evangelists engaged in distribution of religious literature.[7] Because of this conclusion, the Court in *Jones v. Opelika II*, 319 U.S. 103 (1943) vacated the judgment it had reached one term earlier in *Jones v. Opelika I*, 316 U.S. 584 (1942). In *Murdock* Justice Douglas wrote that states and local governments could no more impose a license tax on itinerant evangelists distributing religious literature than it could require a local preacher to register with the government and obtain a license to preach. *Murdock* thus stands for the principle that the church is *immune from taxation* on its core activity of preaching or announcing a religious message to willing hearers or readers.

A year later in *Follett*, this Court extended to

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6 The fact that Congress has determined that private secular employers affecting commerce among the several states must also refrain from employment discrimination on the basis of religion is an excellent illustration of this Court's teaching in *Walz*, *supra*, that the "limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." 397 U.S. at 673. The church needs that kind of an exception. A secular employer does not. The church enjoys express constitutional protection in its internal affairs. A secular employer affecting commerce does not.

7 The opening brief for the Jehovah's Witnesses in *Murdock* noted that several state and lower federal courts had reached the conclusion that churches enjoy a constitutional immunity from taxation imposed on the distribution of religious literature. Petitioners' Brief, at 57-61 (citing cases).

preachers distributing religious literature in their own home towns the constitutionally mandated immunity it had granted to itinerant evangelists in *Murdock*. Although the progression from *Murdock* to *Follett* was hardly a momentous leap, it occasioned a strong dissent suggesting that this form of immunity constituted an impermissible "subsidy for the appellant's religion." *Follett*, 321 U.S. at 581 (Roberts, J., dissenting). That view was squarely rejected in the opinion of the Court and in Justice Murphy's concurring opinion. Justice Douglas explained for the Court that the conclusion that the church is immune from taxation on the proclamation of the gospel

> "does not mean that religious undertakings must be subsidized. The exemption from a license tax of a preacher who preaches or a parishioner who listens does not mean that either is free from all financial burdens of government, including taxes on income or property. We said as much in the *Murdock* case. But to say that they like other citizens may be subject to general taxation does not mean that they can be required to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege."

Follett, *supra*, 321 U.S. at 577-578 (citation omitted). Justice Murphy likewise noted: "It is claimed that the effect of our decision is to subsidize religion. But this is merely a harsh way of saying that to prohibit the taxation of religious activities is to give substance to the constitutional right of religious freedom." *Id.* at 578-579 (Murphy, J., concurring).

The leading decision dealing with exemption of churches from the ad valorem property tax is *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 644 (1970). In *Walz*, the property tax exemption as applied to buildings used exclusively for religious worship was sustained in part precisely because it was not viewed as a subsidy. It seems clear that the Court intended to resolve this very question in *Walz*, for it squarely rejected the contention of the appellant taxpayer that New York's "grant of an ex-

emption to church property indirectly requires [him] to make a contribution to religious bodies..." *Id.* at 667. If it were a true governmental subsidy, that would have been inconsistent with the view of the *Walz* court that the basic purpose of the Religion Clause is "to insure that no religion be *sponsored or favored*...." *Id.* at 669.

The *Walz* court differentiated between a "direct money subsidy" and the "grant of a tax exemption" on the ground that the former would entail "a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed relationships for enforcement of statutory or administrative standards" while the latter "is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." *Id.* at 675.

In his concurring opinion in *Walz*, Justice Brennan noted that ardent separationists like James Madison and Thomas Jefferson strongly resisted Patrick Henry's proposal for a modest *subsidy* to pay teachers of Christian religion in each town in Virginia, but supported the *exemption* of church property from taxation, both at the state level and later as leaders in the federal government. *Id.* at 683-685. They evidently could not have done so if they had viewed the immunity of the church from taxation on its core protected activities as the functional equivalent of a direct subsidy, which - though as small as three pence - would have been enough to provoke their animated opposition. As Justice Brennan put it in *Walz*, "It is unlikely that two men [Madison and Jefferson] so concerned with the separation of church and state would have remained silent had they thought the exemptions established religion." *Id.* at 685 (Brennan, J., concurring). Justice Brennan also acknowledged in *Walz*:

> "Tax exemptions and general subsidies ... are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from the taxpayers as a

> whole. An exemption, on the other hand, involves no such transfer.... Tax exemptions ... constitute mere passive state involvement with religion and not the affirmative involvement characteristic of outright governmental subsidy."

Id. at 690-91 (Brennan, J. concurring).

The distinction between tax exemption and subsidy has long been recognized.[8] Recently it has become blurred, in part by federal budgetary analyses that purport to show the revenue loss from various tax credits, deductions and exemptions. For example, the device known as the "tax expenditure budget" is often used by legislatures to estimate the tax revenue lost for each budget function category under various forms of tax relief.[9] The device was introduced for the purpose of evaluating decisions about appropriating or *spending* the resources estimated to be available under various *taxing*

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8 As Professor Giannella put it: "In the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches. In the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions." Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 Harv. L. Rev. 513, 553 (1968).

9 The concept of a tax expenditure budget is by no means neutral or noncontroversial. For example, one scholar attacks the very core of the device, the comparisons of revenue loss scenarios, as meaningless and unrealistic in the portrayal of their impact on economic activity: "A direct outlay by the government in the purchase of some good or service necessarily involves a direct participation by the government in the marketplace, as well as a direct preemption of the production inputs used to produce the good or service the government buys. Tax expenditures, in contrast, involve no such direct impact on the use of production inputs; rather the economic effect of a tax credit, deduction, preferential rate, etc., results from how the tax provision changes the relative costs and prices of goods or services, and how taxpayers will respond to such changes." M. Carter, *The Tax Expenditure Budget: A Critical Examination,* at 11 (Institute for Research on the Economics of Taxation, Washington, D.C., 1983).

measures.[10] That does not mean, however, that for constitutional purposes, there is no analytical difference between the Taxing Power and the Spending Power. Nor does it mean that the tax expenditure budget is a very useful concept in the area of religion. This is so because religion is one of the things (indeed, in the modern welfare state one of the only things) about which the American people neither expect nor desire the government to do any planning, for the obvious reason that religion in our constitutional order is not a legitimate governmental activity.

For these reasons, the amicus urges that this Court avoid thinking that every imaginable tax benefit enjoyed by a religious organization must be characterized as a "subsidy" for purposes of First Amendment analysis.

Amicus is aware that, in cases decided after *Walz*, this Court has occasionally suggested that both "tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system." *Regan v. Taxation With Representation*, 461 U.S. 540, 544 (1983); see also *Bob Jones University v. United States*, 46 . U.S. 574, 591 (1983) (characterizing both exemptions and deductions as making other taxpayers indirect and vicarious "donors").[11] It should also be noted, however, that the Court is equally capable of drawing appropriate distinctions when necessary.[12]

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10 Amicus notes, however, that since the introduction of the tax expenditure concept into federal budgetary planning, the budget deficit has grown exponentially.

11 On the distinction between exemptions and deductions, see, e.g., Bittker, *Charitable Contributions: Tax Deductions or Matching Grants?* 28 Tax L. Rev. 37 (1972).

12 On the very same page in the United States Reports on which the sentence cited above occurs, Justice Rehnquist added the following footnote: "In stating that exemptions and deductions, on the one hand, are like cash subsidies, on the other, we of course do not mean to assert that they are in all respects identical." 461 U.S. at 544, n. 3 (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 674-676 (197); id., at 690-691 (Brennan, J. , concurring); id., at 699 (opinion of Harlan, J.).

This Court need not, then, lend its authority to those who imagine that our tax laws are driven by a passion for abstract coherence, as some of the "pure tax" theorists imagine. Debates about such matters are more appropriate in the legislative context of budget planning than in the task of constitutional interpretation that the judiciary must undertake. It should be of little or no concern to this Court whether the tax expenditure theory advanced by Professor Surrey[13] or some competing theory, such as the income base theory of Professor Bittker,[14] happens to be prevailing at any given moment. As Justice Black remarked in *Ferguson v. Skrupa*, 372 U.S. 726 (1963): "[Whether] the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours." *Id.* at 732.

What this Court should not lose sight of is the larger principle that distinguishes between forbidden direct governmental subsidies to religious bodies for their religious activities and the mandatory or at least permissible passive governmental restraint on the collection of revenue from religious organizations.

To obliterate this distinction is unnecessary for the resolution of this case and is harmful to the whole concept of limited government that our Constitution is designed to secure. Events throughout the world where these constitutional limits do not obtain are a timely reminder that we should never succumb to the dangerous statist view that the government is the best judge of either the true or the valuable. As Justice Powell cautioned in his concurring opinion in *Bob Jones University v. United States*, 461 U.S. 574, 609 (1983), "provision of tax exemption to nonprofit groups is one indispensable means of limiting the influence of governmental orthodoxy on im-

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13 See, e.g, S. Surrey & P. McDaniel, *Tax Expenditures* (1985); and S. Surrey, *Pathways to Tax Reform* (1973).

14 See, e.g., Bittker and Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 Yale L. J. 299 (1976); and Bittker, *Churches, Taxes and the Constitution*, 78 Yale L. J. 1285 (1969).

portant areas of community life." *Id.* at 609 (Powell, J., concurring). In a similar vein, Justice Brennan noted in *Walz* that nonprofit organizations enjoy tax exemption because "each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society." 397 U.S. at 609 (Brennan, J. concurring). At bottom, our society's commitment to private property and to the health of the private sector means that tax theory is incapable of being reduced to the proposition that the government is entitled to everything except that which it allows taxpayers to keep, which should be deemed a gift from the government.

If anything, the "subsidy" argument works against imposing sales and use tax liability on a church for the distribution of religious literature. As is the case generally with this form of taxation, there are enormous hidden costs of administering sales and use tax imposed on the seller. In 1986 Touche-Ross conducted an empirical study of the actual cost of sales tax collection responsibility on commercial mail-order firms, including a detailed on-site survey of sales and use tax burdens.[15] This study concluded that the average uncompensated net collection costs for the firms participating in the study averaged 15% over and above the tax itself, even after reducing the gross collection costs for the use of proceeds. These costs reflected employee costs, administrative costs, transaction/training costs, data processing costs, fees/bad debt costs and other absorbed costs. *Touche-Ross Study,* at 3-4.

If religious organizations such as the appellant were required to become use tax collectors for the thousands of jurisdictions that impose this form of taxation, their hidden costs of collecting and remitting this form of tax would not be any lower than for the secular merchants

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15 Touche-Ross, *A Study to Determine the Economic Impact on Mail-Order Firms of Multi-State Sales Tax Collection* (1986). A copy of this study has been served on the parties and has been deposited with the Librarian of the Court. It is cited in this brief as "Touche-Ross Study." The pages references in this brief are to the Executive Summary of the study.

surveyed in the Touche-Ross study. Indeed, they would inevitably be higher because one may not assume gratuitously that religious organizations already have the computer hardware or software needed to operate in a multijurisdictional taxing environment efficiently. This conclusion seems a plausible implication of the finding of the Touche-Ross study that the uncompensated costs of administering sales and use tax are a far higher percent of actual tax paid for small firms grossing less than $10 million in annual sales (hidden costs = 25.1% of sales tax) than these costs are for large firms grossing over $100 million in annual sales (hidden costs = 2.4% of sales tax). *Id.* at 6.

Contrary to the suggestion of the plurality in *Texas Monthly, Inc. v. Bullock,* 109 S. Ct. 890 (1989), these empirical considerations demonstrate that the imposition of sales and use tax collection liability would significantly "inhibit religious activity." 109 S. Ct. at 901. It is, moreover, reasonable to infer from these data that imposition of this form of taxation would have a more detrimental impact on smaller religious bodies, and would favor to that extent larger, more "established" religious bodies, in violation of the equality principle at the core of the nonestablishment principle. See, e.g., *Larson v. Valente*, 456 U.S. 228 (1982).

In short, under the free exercise principle the state may not inhibit the direct communication of religious convictions to religious adherents by subjecting them to taxation. But that does not mean that when the state stays the hand of the tax collector in this way it is thereby subsidizing the activities of the church in a manner prohibited by the Establishment Clause. It is merely acknowledging the rightful immunity of the church from the government's pervasive power to regulate and control.

B. The History of Repugnance to Taxes on Knowledge Informs the Current Discussion over Whether A State May Impose Sales Tax on a Religious Body for the Distribution of Religious Literature to its Members Attending a Rally within the Taxing State.

In addition to the reasons offered above for granting a limited immunity from taxation of religious bodies for the transmission of their religious beliefs to their members, amicus suggests the significance of the history of tax resistance in the period of the national founding. Because of its comprehensive scope, taxation is the most significant mechanism of governmental power. It is the predicate for all the others functions of government. For that very reason, the most important tax revolt in this nation's history was joined to ideas of representative democracy in this country's revolution against the British Crown.

The colonists had incorporated into the American experience a variety of practices related to the financial support of established or preferred religious groups. As was noted above, the colonists who began the struggle over religious liberty, principally the Baptists and the Quakers in New England, reacted strongly against these practices. W. McLoughlin, *New England Dissent*, *supra*. The late seventeenth century and early eighteenth century struggle for exemption of dissenting Protestants from taxation to support the established church (Congregational in New England, Episcopal in the southern colonies) turned out to be the seedbed of political revolt against the Crown under the rallying cry, "No taxation without representation." Equally significant was the strong repugnance in the colonial period to "taxes on knowledge." See, e.g., E. & H. Morgan, *The Stamp Act Crisis* (1963). Thus a clear recognition of limits on the taxing power was at the core of the revolutionary spirit that gave birth to this nation.

This Court has repeatedly acknowledged the significance of this history in the resolution of contemporary First Amendment issues. See, e.g., *Grosjean v. American*

Press Co., 297 U.S. 233, 245-248 (1936). Indeed, in the two leading cases most directly on point to this case, the Court made pertinent observations on this very matter. In *Murdock* Justice Douglas wrote: "The taxes imposed by this ordinance can hardly help but be as severe and telling in their impact on the freedom of the press and religion as the 'taxes on knowledge' at which the First Amendment was partly aimed." 319 U.S. at 115. A year later in *Follett*, Justice Douglas again noted:

> "Freedom of religion is not merely reserved for those with a long purse. Preachers of the more orthodox faiths are not engaged in commercial undertakings because they are dependent on their callings for a living. Whether needy or affluent, they avail themselves of the constitutional privilege of a 'free exercise' of their religion when they enter the pulpit to proclaim their faith. The priest or preacher is as fully protected in his functions as the parishioners are in their worship. A flat license tax on that constitutional privilege would be as odious as the early 'taxes on knowledge' which the framers of the First Amendment sought to outlaw."

321 U.S. at 576-577.

Built into the First Amendment was a history of repugnance to taxes on knowledge in general and to illicit licensing of religious speech in particular. The conclusion is obvious that constitutional limits on taxation were clearly within the intent of the framers of the First Amendment. Since that history is highly relevant to the resolution of this case, that history should inform the current discussion over whether a state may impose sales tax on a religious body for the distribution of religious literature to its members attending a religious worship service.

II. Neither Occasional Religious Rallies within a Taxing State, nor the Use of the Mails by a Religious Body to Distribute Religious Literature to its Religious Adherents Creates Sufficient Nexus to Impose Sales and Use Tax Liability on an Out-of-State Religious Body.

The State Board of Equalization in this case predicated appellee's claim to jurisdiction on the occasional presence of a preacher in California to conduct a religious meeting. For the same reasons offered above in Part I, it is impermissible to base the jurisdiction of the state to tax on an event manifestly involving protected noncommercial, religious speech.

The Commerce Clause and the Due Process Clause preclude a state from exercising jurisdiction over a person outside its borders unless there is sufficient nexus. Hence, even if it were permissible to establish nexus on the basis of the clearly protected activity of preaching, the infrequent visits of the appellant to California are insufficient under the precedents of this Court on nexus. *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551 (1977). Episodic contacts with a taxing jurisdiction are not enough to establish nexus. *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954). Neither may nexus with California be predicated on the mere use of the federal instrumentality of the mails by a preacher in Louisiana to distribute religious literature to religious adherents in California. *National Bellas Hess v. Dept. of Revenue*, 386 U.S. 753 (1967).

In *National Geographic, supra*, appellee urged this Court to accept the view that the "*slightest presence*" of a potential taxpayer in a taxing jurisdiction suffices to establish constitutional nexus. Despite the acceptance of that view by the California Supreme Court, 16 Cal. 3d 637 (1976), this Court soundly repudiated that view. Justice Brennan wrote that nexus was established by virtue of the appellant's "*continuous presence* in California in offices that solicit advertising...." 430 U.S. at 562 (emphasis supplied).

Subsequent decisions have reemphasized that nexus

can be established only on a showing of some form of *continuous presence* within the taxing jurisdiction. See, e.g, *D.H. Holmes Co. v. McNamara*, 108 S. Ct. 1619 (1988) (stores); *Tyler Pipe Industries, Inc. v. Washington Dept. of Rev.*, 107 S. Ct. 2810, 2821-2822 (1987) (permanent sales representative). Amicus urges this Court to adhere to this position, requiring continuous and substantial presence, not mere occasional contacts or the slightest presence of an out-of-state party, in order to establish sufficient nexus with a taxing jurisdiction for purposes of use tax liability.

Because appellee was unable to demonstrate such continuous presence of the appellant in California, it attempted to establish nexus by relying solely on the occasional presence of the preacher in that state to conduct religious crusades. The uncontested and uncontrovertable facts established on this record show that the preacher was not in California at all in 21 of the 28 tax periods at issue in this case.[16] Mr. Swaggart was in California to conduct evangelistic crusades a total of 52 days in 7 years, or an average of a little over 7 days per year. Tr. Exhibit 50. In many of the cities visited by Mr. Swaggart during his occasional visits to California, he stayed for only a single day; only once in seven years did he stay in a city for more than 3 days.[17] To characterize these fleeting and sporadic contacts as "substantial" or "continuous" is to turn on their head the standards that this Court has enunciated for commercial transactions by out-of-state business concerns.

This case, in short, illustrates the very concerns of this Court in *Miller Bros.*, *National Bellas Hess*, and *National Geographic* and their progeny. Even if it were permissible to establish nexus on the basis of the clearly

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16 Under applicable state law in this case, the taxable period is defined as a quarter, not a year. Cal. Rev. & Tax Code §§ 6451-6452, 6455.

17 A typical evangelistic crusade consists of one religious service, generally in the evening, at which the evangelist typically preaches only one sermon.

protected activity of preaching, the *infrequent* visits of the appellant to California are insufficient under the precedents of this Court on nexus. Neither may nexus with California be predicated on the mere use of the federal instrumentality of the *mails* by a preacher in Louisiana to distribute religious literature to religious adherents in California.

III. A Case Focused Primarily on First Amendment Freedoms is an Improper Vehicle to Announce a Shift in the Nexus Requirements Governing the Taxation of Commercial Enterprises that Operate in Interstate Commerce.

The issue of appropriate standards for establishing sufficient nexus over out-of-state commercial enterprises, especially mail-order businesses, is a highly controversial matter that is currently being debated in Congress. The text of the Constitution commits the power to regulate commerce among the several states to the Congress. In the event that Congress enacts legislation that erroneously dilutes the standards on this matter already set down by this Court, it will be time enough to correct those errors in subsequent litigation. It is unnecessary for the Court to enter into this controversy, however unwittingly, at this time. Amicus urges this Court to avoid dicta in this case that may have a major business impact in a completely different context from that envisioned here.

Because appellant is a church engaged in religious ministry, appellant has understandably chosen to present this case to this Court primarily as a case imperiling religious freedom.[18] Appellant has argued in its opening brief that, to avoid the chilling of protected religious ac-

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18 For reasons irrelevant to this brief, the trial court refused to allow the appellant to present its evidence on the nexus issue. Although the record on this issue is not fully developed in this case, the issue appears to have been adequately preserved and has been presented to this Court for its consideration. J.S. App. F3-F4; J.A. 21; Tr. 6-21, 216-225.

tivity, a prophylactic rule is needed that would make it impermissible to use that protected religious activity as the basis for a finding of nexus that would have the direct result of imposing upon the church the significant burden of use tax collection responsibility for all future distribution of religious literature to its members in California. For the reasons set forth in Part I of this brief, amicus supports appellant on that claim.

If this Court does not accept this Religion Clause claim, it by no means follows that the judgment of the court of appeal should be affirmed. Even without a First Amendment overlay on the nexus requirements, under existing precedents it seems clear that appellant should prevail on its nexus claim that it has not had sufficient contacts with California to become subject to its taxing authority.

As was suggested above in Part II, the combined force of *National Geographic*, *National Bellas Hess*, and *Miller Bros.* requires the reversal of the decision below. In *National Geographic*, *supra*, Justice Blackmun intimated that he might be prepared to reconsider the rationale of *Miller Bros.* and *Bellas Hess*. 430 U.S. at 562-563 (Blackmun, J. concurring). There is, however, no good reason to disturb the precedential value of these cases. For example, although *Bellas Hess* was decided over a vigorous dissent, that dissent was itself premised on the view of the record in that case that the out-of-state mail-order house had far greater contacts with Illinois than the majority was willing to acknowledge. 386 U.S. at 761-762 (Fortas, J. dissenting) (seller regularly and continuously engaged in "exploitation of the consumer market" and of the banking and credit facilities of the taxing state). See also *Miller Bros.*, 397 U.S. at 358 (Douglas, J., dissenting) (record viewed as supporting *regular* advertising and delivery within taxing jurisdiction). Far from undermining the sound conclusion reached in *National Geographic* that continuous and substantial presence are required to establish nexus, the dissents in *Miller Bros.* and *Bellas Hess* assume that standard and argue about its application to the facts of those cases.

Since *National Geographic,* moreover, this Court has continued to cite *Bellas Hess* as the governing standard. See, e.g., *D.H. Holmes Co. v. McNamara*, 108 S. Ct. 1619, 1624 (1988); *Goldberg v. Sweet*, 109 S. Ct. 582, 590 (1989).

In a case so pervaded with sensitive issues arising under the Religion Clause, amicus urges this Court not to break new ground in the complicated area of the requirements under the Commerce Clause and the Due Process Clause for nexus sufficient to trigger taxing jurisdiction over an out-of-state entity. A premature pronouncement on the nexus issue may later be taken to preclude or limit further consideration of that issue. It would not seem to be a wise use of the resources of this Court to announce new rules governing nexus in a case where the record on that matter is undeveloped. Rather, a desire to assure the best possible conditions for thoughtful decision by the Court would suggest that a case with a fuller record would serve as a better vehicle for further elaboration on the nexus requirements. See, e.g., *Baker v. Carr*, 369 U.S. 186, 204 (1962) (Court depends on sharp presentation of issues for illumination of difficult questions); K. Ripple, *Constitutional Litigation* 221-273 (1984). If the nexus issue is deemed central in this case, the judgment below should be reversed and remanded with instructions to develop a full record on the contacts of appellant in California during the relevant taxing periods.

CONCLUSION

For these reasons, the judgment of the Court of Appeal of California should be reversed.

Respectfully submitted,

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